Malaysian International Merchant Bankers Bhd v Richard Lee Chiong Woo

HIGH COURT (KUCHING) — SUIT NO 22–194 OF 1998–II
ZAKARIA BIN SAM JC
19 JANUARY 2001

Banking *— Securities for advances — Mortgage of shares — Margin of advance — Sale of shares when margin of advance fell — Whether bank under duty to forthwith dispose of the shares when security margin fell below stipulated point*

Civil Procedure *— Summary judgment — Delay — Whether inordinate delay in making application for summary judgment — Application for summary judgment postponed until all shares mortgaged to plaintiff were sold — Whether explanation for delay in filing application for summary judgment acceptable — Rules of the High Court 1980 O 14*

This was an appeal by the plaintiff against the decision of the deputy registrar dismissing its application to enter final judgment against the defendant. The plaintiff had granted to the defendant a revolving credit facility pursuant to the terms contained in a facility agreement. As security for the revolving credit facility, the defendant charged or mortgaged to the plaintiff shares in a public listed company ('the shares'). It was a term of the facility agreement that the minimum security coverage be maintained at 1.67 times the loan outstanding at all times. It was the plaintiff's case that the security margin dropped below the required margin of 1.67 times. The plaintiff made several demands to the defendant to deposit additional shares but the defendant failed to do so. On 13 July 1997, the plaintiff recalled the revolving credit facility and demanded the defendant to repay the whole amount owing thereunder. On 10 September 1998, this suit was filed against the defendant to recover the amount outstanding. All the shares were sold by 8 December 1998 but the amount realized was not sufficient to repay the amount outstanding. In his defence, the defendant alleged that the plaintiff was in breach of its duty as a mortgagee of the shares by failing to dispose of the shares at a time that would result in a credit balance to the defendant. Clause 3.10 of the facility agreement provided that 'if at any time the security margin falls below one point sixty seven (1.67) times of the indebtedness, MIMB shall be entitled at MIMB's absolute discretion forthwith to realize the said shares without further reference to the borrower'. Secondly, the defendant alleged that there was inordinate delay in making this application for summary judgment.

Held, allowing the application:

(1) There were four courses of action that the plaintiff could take when the security margin fell below the stipulated margin. The plaintiff could: (a) request the defendant to pledge or charge additional securities to the plaintiff under cl 3.3 of the facility

agreement; (b) request the defendant to deposit with the plaintiff additional certificates to stocks and shares as provided in cl 3.7; (c) realize the mortgaged securities under cl 3.9 if the defendant failed, within seven days from the plaintiff's notice, to pledge or charge additional securities to or deposit with the plaintiff additional certificates to stocks and shares; or (d) realize the mortgaged securities pursuant to cl 3.10. The plaintiff's rights were therefore not limited to cl 3.10 of the facility agreement (see pp 220A–F, 221G).

(2) It was not the intention of cl 3.10 of the facility agreement that the plaintiff forthwith realize the shares when the security margin fell below the stipulated point. The discretion to sell was the plaintiff's. This right was further entrenched by cl 8 of the memorandum of deposit which provided that the plaintiff may sell any of the shares in such manner and at such prices it deemed fit. If the plaintiff opted to exercise their rights under cl 3.10, it was then not bound by cll 3.3, 3.7 and 3.9 of the facility agreement (see pp 221G–I, 222F).

(3) The defendant had failed to raise any triable issue. The burden was on the defendant to prove that the plaintiff was negligent in its transactions and the defendant failed to discharge this onus. There was no complaint by the defendant to the plaintiff about the alleged negligence before the suit was filed and in fact the defendant pleaded with the plaintiff not to dispose of the shares (see p 223G–I).

(4) The plaintiff's explanation for the delay in filing the application for summary judgment under O 14 of the Rules of the High Court 1980 was acceptable because according to the plaintiff, at the time of filing the suit, some of the shares were yet unsold. As such, the application for summary judgment had to be postponed until all the shares were sold and the statement of claim amended to take into account the subsequent disposal of the shares (see p 224B–C).

[Bahasa Malaysia summary

Ini adalah rayuan oleh plaintif terhadap keputusan timbalan pendaftar yang menolak permohonannya untuk memasuki penghakiman muktamad terhadap defendan. Plaintif telah memberikan kepada defendan satu kemudahan kredit pusingan selaras dengan terma-terma yang terkandung di dalam satu perjanjian pinjaman. Sebagai jaminan untuk kemudahan kredit pusingan tersebut, defendan telah menggadaikan atau mengadai-janji saham-saham dalam sebuah syarikat tersenarai awam kepada plaintif ('saham-saham tersebut') Adalah merupakan satu terma perjanjian kemudahan tersebut bahawa jaminan perlindungan minima hendaklah dikekalkan pada 1.67 kali pinjaman yang masih belum jelas pada setiap masa. Adalah menjadi

kes plaintif bahawa margin jaminan tersebut jatuh di bawah margin yang diperlukan sebanyak 1.67 kali. Plaintif telah membuat beberapa tuntutan kepada defendan supaya mendepositkan saham-saham tambahan tetapi defendan gagal untuk berbuat demikian. Pada 13 Julai 1997, plaintif menuntut kembali kemudahan kredit tersebut dan menuntut supaya defendan membayar balik keseluruhan jumlah yang terhutang di bawahnya. Pada 10 September 1998, guaman ini telah difailkan terhadap defendan untuk mendapatkan kembali jumlah yang masih belum jelas. Sehingga 8 Disember 1998 semua saham tersebut telah dijual tetapi tidak mencukupi untuk membayar balik jumlah yang masih belum jelas. Dalam pembelaannya, defendan mengatakan bahawa plaintif telah memungkiri kewajipannya sebagai pemegang gadai-janji saham-saham tersebut apabila plaintif gagal untuk melupuskan saham-saham tersebut pada masa yang akan menyebabkan baki kredit kepada defendan. Fasal 3.10 perjanjian pinjaman tersebut memperuntukkan bahawa 'if at any time the security margin falls below one point sixty seven (1.67) times of the indebtedness, MIMB shall be entitled at MIMB's absolute discretion forthwith to realize the said shares without further reference to the borrower'. Keduanya, defendan mengatakan bahawa telah berlaku kelewatan yang melampau dalam membuat permohonan ini untuk penghakiman terus.

Diputuskan, membenarkan permohonan tersebut:

(1) Terdapat empat tindakan yang boleh diambil oleh plaintif apabila margin jaminan jatuh di bawah paras margin yang ditetapkan. Plaintif boleh: (a) meminta defendan mencagarkan atau menggadaikan jaminan-jaminan tambahan kepada plaintif di bawah fasal 3.3 perjanjian kemudahan tersebut; (b) meminta defendan mendepositkan dengan plaintif sijil-sijil tambahan kepada stok-stok dan saham-saham seperti mana yang diperuntukan di dalam fasal 3.7; (c) melangsaikan jaminan-jaminan yang telah digadai-janji di bawah fasal 3.9 jika defendan gagal, dalam tempoh tujuh hari daripada tarikh notis plaintif, untuk mencagarkan atau menggadaikan jaminan-jaminan tambahan kepada atau mendepositkan dengan plaintif sijil-sijil tambahan kepada stok-stok dan saham-saham; atau (d) melangsaikan jaminan-jaminan yang digadaikan selaras dengan fasal 3.10. Hak plaintif dengan itu tidak terhad kepada fasal 3.10 perjanjian pinjaman tersebut (lihat ms 220A–F, 221G).

(2) Bukan niat fasal 3.10 perjanjian pinjaman tersebut bahawa plaintif hendaklah segera melangsaikan saham-saham tersebut apabila margin jaminan jatuh di bawah paras yang ditetapkan. Budi bicara untuk menjual terletak pada plaintif. Hak ini diperkukuhkan lagi oleh fasal 8 memorandum deposit yang mana telah memperuntukkan bahawa plaintif boleh menjual mana-mana dari saham-saham tersebut mengikut cara sedemikian dan pada harga sedemikian yang ia anggapkan sesuai. Jika plaintif memilih untuk

melaksanakan hak-hak mereka di bawah fasal 3.10, plaintif adalah dengan itu tidak terikat oleh fasal-fasal 3.3, 3.7 dan 3.9 perjanjian pinjaman tersebut (lihat ms 221G–I, 222F).

(3) Defendan telah gagal untuk membangkitkan sebarang isu yang boleh dibicarakan. Bebanan adalah terletak ke atas defendan untuk membuktikan bahawa plaintif telah bertindak secara cuai di dalam transaksi-transaksinya dan defendan telah gagal untuk melepaskan bebanan ini. Tidak terdapat aduan oleh defendan kepada plaintif mengenai kecuaian yang dikatakan sebelum guaman tersebut difailkan dan malahan defendan telah merayu kepada plaintif supaya tidak melupuskan saham-saham tersebut (lihat ms 223G–I).

(4) Penjelasan plaintif bagi kelewatan dalam memfailkan permohonan untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 boleh diterima kerana menurut plaintif, pada waktu memfailkan guaman tersebut, sebilangan saham-saham tersebut masih belum dijual. Oleh yang demikian, permohonan untuk penghakiman terus haruslah ditangguhkan sehingga semua saham tersebut telah dijual dan pernyataan tuntutan dipinda untuk mengambilkira pelupusan kemudiannya saham-saham tersebut (lihat ms 224B–C).]

Notes

For cases on securities for advances, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1422–1555.

For cases on delay, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5894–5897.

Cases referred to

Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)

Keppel Finance Ltd v Phoon Ah Lek [1994] 3 MLJ 26 (refd)

Krishnamurthy & Anor v Malayan Finance Corp Bhd [1986] 2 MLJ 134 (refd)

Anne Teo (*Lim & Teo*) for the plaintiff.

Osman Ibrahim (*Osman Ibrahim & Co*) for the defendants.

Zakaria bin Sam JC: This is an appeal by the plaintiffs against the decision of the deputy registrar given on 2 February 2000, dismissing their application for final judgment against the defendant for the sum of RM5,317,199.47 being the balance due and outstanding under a revolving credit facility ('RC facility') which was granted by the plaintiffs to the defendant on 23 December 1996.

It is an undisputed fact that the defendant had entered into a facility agreement dated 25 January 1997 for the RC facility of RM5m. By the memorandum of deposit (also dated 25 January 1997) in consideration of

A the plaintiffs granting the RC facility, the defendant charged or mortgaged 700,000 public listed shares of Foreswood Group Bhd ('the said shares') to the plaintiffs as security. The facility agreement stipulates that the minimum security coverage must be maintained at 1.67 times the loan outstanding at all times.

B It is the plaintiffs' case that on 30 December 1997, the security margin of the said shares dropped below the required margin of 1.67 times to a mere 1.043 times. The plaintiffs made several demands through letters to the defendant to deposit additional shares to the plaintiffs to cover the shortfall. In breach of the facility, the defendant failed to comply with the plaintiffs' request.

C On 13 July 1997, the plaintiffs recalled the whole RC facility and demanded the defendant to repay the whole amount owing under the said RC facility amounting to RM5,427,671.80 together with interests.

On 10 September 1998, this suit was filed against the defendant for the recovery of RM5,565,133.96 (as at 18 August 1998).

D As at 8 December 1998, all the said shares were sold off. The amount realized was credited to the defendant's account but there was still a considerable short fall of RM5,317,199.47. This is reflected in the amended statement of claim dated 3 May 1999.

A statement of defence and a counterclaim (both later amended) were E filed.

In his defence, the defendant raised only two issues.

He alleged that the plaintiffs were in breach of fiduciary duties between the plaintiffs, as banker, and the defendant, as a customer, by failing to dispose off the shares pledged to them at a time that would result in credit balance particularly on 30 December 1997 when the 700,000 shares @ F RM7.45 per share would have yielded RM5,215,000. The defendant argues that the plaintiffs had an unfettered right to dispose of shares without notice being given to the defendant.

Secondly, there was inordinate delay in making this O 14 application as the statement of claim was filed on 10 September 1998 and this application G was only served on him on 11 June 1999.

The first issue

Were the plaintiffs in breach of its duty as mortgagee of the said shares by failing to sell off the 700,000 shares on 30 December 1997 as stipulated by H cl 3.10?

To have a clearer picture of the issue at hand, the relevant clauses of the facility agreement and memorandum of deposit (shares) are as follows:

Facility agreement:

Clause 3.2

I At all times, the borrower undertakes to keep and maintain the market value of the said shares, being the latest quoted prices of the said shares on the KLSE at any one time, and from time to time ('the Market Value'), at not less

than one point sixty seven (1.67) times the amount of the indebtedness outstanding at any one time and from time to time ('the Security Margin'). A

Clause 3.3

In the event the Market Value of the said shares falls below the Security Margin at any time, or ceases to provide a margin of security satisfactory to MIMB, the borrower shall, at MIMB's option either: B

3.3.2 pledge or charge additional acceptable securities to MIMB to cover the shortfall created by a drop in the Market Value of the said shares.

Clause 3.7

If at any time hereafter:

3.7.1 due to a change in the Market Value of the said shares or the Security Margin has been reduced; C

then MIMB may at any time while such circumstances are continuing, require the borrower to either:

3.7.4 deposit with MIMB such additional certificates or other evidence of title to stocks, shares and securities acceptable to MIMB so as to comply with the requirements hereinbefore; ... . D

Clause 3.9

If the borrower fails to comply with MIMB's requirements pursuant to the above provisions of this cl 3 hereof within seven (7) days of the date of a notice from MIMB, MIMB shall be entitled at MIMB's absolute discretion forthwith to realize the mortgagee's securities without further reference to the borrower. E

Clause 3.10

Notwithstanding the requirements hereinabove stated, if at any time the security margin falls below one point sixty seven (1.67) times of the indebtedness, MIMB shall be entitled at MIMB's absolute discretion forthwith to realize the said shares without further reference to the borrower. F

Clause 4.3

The RC facility shall be available continuously and shall be valid for a tenure of twelve (12) months from the date of MIMB's letter of offer dated 23 December 1996 ('the expiry date') unless terminated earlier in writing by MIMB. G

Clause 24.6

Notwithstanding the provisions of cl 24.5 hereof, MIMB has the right and liberty to sell any or all of the mortgage securities as MIMB deems fit or necessary after five (5) continuous days of any breach of the provisions herein contained, any default of payment/repayment or any event of default as defined in cl 24. H

Memorandum of Deposit (shares):

Clause 8

Consequence of failure to pay, etc I

Upon the occurrence of an event of default (as defined in the facility agreement) the lender shall be at liberty at any time afterwards without notice

A to me and without my consent, to sell the securities or any of them in such manner, at such price or prices and whether on tender of cash or credit (whether payable or deliverable immediately or by instalments), without being responsible for loss unless the same is caused by gross negligence or willful default, as the lender may deem expedient, and to apply the net proceeds of such sale in or towards payment of the charge of the costs so incurred and or the indebtedness. ...

B

What is the true construction of cl 3.10?

The defendant's interpretation of that clause is that the plaintiffs should have realized the shares on 30 July 1997 when the security margin dropped below 1.67 times the loan outstanding, on the same day at the price of RM7.45 per share the total value of securities held by the plaintiffs was RM5,215,000 and it would have been more than adequate to pay the defendant's indebtedness including principal repayment resulting in a credit balance.

C

The plaintiffs on the other hand argued that the plaintiffs' right to sell the said shares would only arise under two circumstances :

D

(i) under cl 3.9 where the power of sale of the said shares only arise after seven days of the notice, ie 7 January 1998 as the first notice was given on 31 December 1997, at which time the closing price was RM1.47 x 700,000 equivalent to RM1,029,000; or

E

(ii) under cl 24.6 (event of default clause) where the plaintiffs have the right to sell any or all of the said shares as the plaintiffs deemed fit or necessary after five days of any breach of the provisions contained, any default of any event or repayment or any event of default. Applying this clause, the power of sale of the said shares would only arise on or about 4 January 1998, ie five days after the security margin fell below the required level after the defendant failed to respond to the plaintiffs' request to pledge additional shares to cover the shortfall. On Monday 5 January 1998, the closing price was RM2.40 v 700,000 equivalent to RM1,680,000.

F

G It is my considered opinion that when the security margin fell below the stipulated margin, the plaintiffs had four options to act, either under cl 3.3 or cl 3.7 or cl 3.9 or cl 3.10. Therefore their rights are not limited to cl 3.10 only.

Furthermore, it is not the intention of cl 3.10 that the moment the margin fell below the stipulated point, the plaintiffs must forthwith realize the said shares.

H

What is entrenched by cl 3.10 is that if the plaintiffs opt to exercise their right under the said clause, they are not bound by the provisions and the procedural requirements of cll 3.3, 3.7 and 3.9.

Even then the plaintiffs do not have to realize the said shares forthwith or immediately. The discretion to sell was still theirs. The relevant authority in support of the above decision can be found in *Keppel Finance Ltd v Phoon Ah Lek* [1994] 3 MLJ 26 where:

I

Clause 13 of both the loan agreements, ie in respect of the defendant and in respect of Ng Wing Fatt, provides that: A

> When the security created by this agreement shall become enforceable the lender shall without prejudice to any other remedies ... forthwith be entitled as and when they shall think fit with or without notice to all or any of the following:
>
> (a) to sell or dispose of the securities or any part thereof ... in such manner and for such consideration the lender shall think fit ... B

The memorandum of deposit provided by the defendant and by Ng Wing Fatt in respect of the shares pledged to the plaintiffs provides:

> ... if and whenever the market value of the mortgaged securities does not exceed my indebtedness by 154% you are at liberty without demand or notice to sell as you think fit all or any part of the mortgaged securities. ... C

It was held by VC George J that:

> It is to be noted that in the loan agreement the provision is not that the 'plaintiff shall forthwith sell and dispose of the securities' or words to like effect but that the plaintiffs shall forthwith 'be entitled as and when they shall think fit ... to sell and dispose of the securities'. The memorandum of deposit does not provide that the plaintiffs 'shall sell'. What it does is to give 'liberty to sell as you think fit'. It is also to be noticed that the liberty to sell is in respect of 'all or any part of the mortgaged securities' which per se clearly indicates that the plaintiffs were not expected on default or on the margin not being met to forthwith sell off *all* the securities. (Emphasis added.) D E

In my opinion, even though the loan agreement and memorandum of deposit in *Keppel's* case and the present appeal used different words, the effect are the same. Both give the liberty to sell at the bank's discretion or as they deem fit.

By the wordings of cl 3.10, the plaintiffs could dispose off the said shares at their absolute discretion. This right is entrenched further by cl 8 of the memorandum of deposit (shares) where the plaintiffs may sell any of them in such manner at such price or prices. F

Judging by the letters sent by the plaintiffs to the defendant (ie exhs TL 6 to TL 17 and TL 21 to TL 28 dated 31 December 1997 to 10 March 1998 (various dates) annexed to the affidavit of Tom Lannau in support of the O 14 application) requesting the defendant to pledge additional shares to meet the stipulated ratio, it is without doubt that the plaintiffs were exercising their option under cl 3.3 and not cl 3.10. This invites the application of cl 3.9. G

The defendant in his defence asserted that he was not obliged to pledge additional shares at all as the said RC facility had already expired. This assertion is clearly misconceived. On the expiry of the RC facility, the defendant could not or had no right to make any or any further drawdown under the RC facility but the facility agreement and the obligations of the parties therein remain continuing for as long as the indebtedness under the RC facility remains outstanding. H I

Tom Lannau in his affidavit (para 29(i)) further deposed that the defendant had in January 1998 at a meeting with the plaintiffs, orally

requested the plaintiffs for indulgences or time to repay the total indebtedness. The defendant had also requested the plaintiffs not to sell the shares for the reason that he needed more time to regularize his position, and that he was negotiating with Japanese investors with the intention to divest some of his equity in Foreswood Group Bhd and to settle the total due and outstanding with the plaintiffs. By a letter dated 17 January 1998 (exh TL 30), the defendant reaffirmed these reasons and requested the said shares not to be liquidated.

This evidence is not challenged by the defendant.

Hence, acting and relying on the defendant's representations, the plaintiffs witheld the sale of the said shares and it was not until 19 February 1998 that they started selling the shares as at that point of time the defendant had failed to service the amount of accumulating interest charges under the RC facility, in particular the December 1997 and January 1998 interests.

Again, by letters (as per exh TL 31 to TL 34 dated 27 February 1998 to 29 February 1998), the defendant made further requests for extension of time to pay the plaintiffs which were granted.

These facts were also not denied by the defendant.

The only explanation offered by the defendant was that he was under economic duress and forced to request numerous extensions of time.

Tom Lannau further deposed that on 15 May 1998, 4 June 1998 and 11 June 1998 the defendant had made part payments of the interests outstanding for the months of April to May 1998 amounting to RM131,930.79. These too were not challenged by the defendant. If the plaintiffs were negligent, he should not have paid the accrued interests. In fact, it was the defendant who delayed the realization of the said shares as he was doing his best to settle the claims by the plaintiffs.

There is no basis whatsoever for the defendant to blame the plaintiffs for the loss.

In *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 it was held that:

> When an application is made for summary judgment under O 14 supported by an affidavit showing that there is no defence, the defendants must show cause why leave to defend must be given. The defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried.

The burden is always on the defendant to prove that the plaintiffs were negligent in their transactions. The defendant failed to discharge this onus.

There is not even a single letter or complain to the plaintiffs about the alleged negligence before the suit was filed. In fact, he was pleading with the plaintiffs not to liquidate his pledged shares.

Clearly, the conduct of the defendant shattered his own defence. It has clearly been shown that there is doubt as the bona fide of the defence case.

I hold that the defendant has failed to raise any triable issues that merit for trial.

Was there inordinate delay in making this O 14 application?

It was held by the Supreme Court in *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 that:

> ... The law as to the time when an application for an O 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed.

Tom Lannau in his affidavit deposed that at the time of filing the suit on 10 September 1998, the balance of the said shares remaining unsold stood at 492,000 shares. The application for summary judgment had to be postponed until all the said shares were sold and the total proceeds of such sales applied to the amount outstanding under the RC facility. This entailed the necessity to amend the statement of claim on 28 January 1999 to take into account of the further disposal of the mortgaged shares, ie to reduce the total amount of debt owing from RM5,565,133.96 to RM5,317,199.47.

I am satisfied with this explanation and accept it.

Conclusion

In conclusion, I am of the view that there is no merit to the defence case and is therefore only right that the plaintiffs' application for O 14 be allowed.

Costs here and the court below to the plaintiffs to be taxed unless agreed.

Application allowed.

Reported by Lim Lee Na